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No. 84-1796

In The

Supreme Court of the United States

October Term, 1984

THE FOLGER COFFEE COMPANY,

Petitioner,

v.

INDIAN COFFEE CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS P. RAVIS, ESQ.
Counsel of Record
992 Perry Highway
Pittsburgh, Pennsylvania 15237
(412) 367-7271
Attorney for Respondent
INDIAN COFFEE CORP.

Of Counsel:
FRANK R. FLEMING, III, ESQ.
HOUSTON HARBAUGH
Two Chatham Center
Twelfth Floor
Pittsburgh, Pennsylvania 15219
(412) 281-5060

COCKLE LAW

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In this litigation, now almost nine years old, Indian Coffee Corp. ("Indian Coffee") charges Folger Coffee Company ("Folger") violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. Section 13(a). Indian Coffee alleges that Folger, a large, multi-market, financially powerful coffee manufacturer, entered the local Pittsburgh market (as well as Cleveland); for a year in Pittsburgh and longer in Cleveland it offered increasingly large allowances (much greater than those in other areas) to the grocery trade to encourage purchase of its coffee; it caused the amount paid by the grocer to be less than the cost of producing and delivering the coffee; it created a market dominated by itself and another large multi-market coffee manufacturer, a market in which all other competitors suffered severe reductions in market share, sales and competitive vigor; and it forced Indian Coffee, the only local competitor (with the #2 market position in Pittsburgh) out of business altogether because it could not compete with the long continued below cost selling.

The Court of Appeals for the Third Circuit unanimously reversed the trial court's directed verdict against Indian Coffee entered at the end of its case. The questions arising out of that judgment are essentially factual in nature and may be stated as follows:

1. Whether the Court of Appeals was correct in ruling admissible Indian Coffee's uncontradicted expert opinion evidence on valuation, based on data which the experts attested without contradiction was of a type reasonably relied upon by experts in their fields, and in con-

sidering such evidence together with other direct and circumstantial evidence in holding that a directed verdict was improper in this case.

2. Whether the Third Circuit was correct in holding that a directed verdict was improper in this case where the factual record contains evidence from which a jury could find harm to competition where the Indian Coffee had shown both actual competitive injury and evidence of sales below cost from which predatory intent could be inferred.

3. Whether this Court should reassess the factual record to determine if the Third Circuit was correct in ruling that a directed verdict was improper where Indian Coffee had provided sufficient evidence to show that the injury it suffered was causally related to Folger's alleged violation of the Robinson-Patman Act.

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COUNTER-STATEMENT OF THE CASE

A. Nature of the Case and Procedural History.

This civil action was brought in October, 1976 by Indian Coffee Corp. ("Indian Coffee") against The Folger Coffee Company ("Folger") seeking treble damages for violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. Section 13(a). A primary line case, it involves geographical price discrimination in the sale of regular vacuum packed coffee ("coffee") to the grocery trade from late 1971 through early 1974, first in the Cleveland market area and later in the Pittsburgh market area as well.

Consideration of Folger's unmeritorious summary judgment motions, extensive discovery and Folger's equally unmeritorious pretrial evidentiary objections, consumed over six years. All of this time, expense and judicial effort delayed Indian Coffee in having a trial until 1983.

A jury trial began March 24, 1983, and continued to April 27, 1983, before District Court Judge Gustave Diamond. Several days into the trial, the District Court, for the first time, defined price for Section 2(a) effectively as list price less off invoice allowances (1-337a, 338a).[1] On April 27, 1983 at the close of Indian Coffee's evidence, a directed verdict was entered for Folger (36A) on the grounds that Indian Coffee had failed to establish harm

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1. References to the Petition for the Writ of Certiorari are abbreviated "Pet. ———". Page references to the Appendix to the Petition are given in the form "——A". Page references to the Appendix in the Court of Appeals are given in the form "——a". A copy of the Appendix filed in the Court of Appeals is lodged with the Office of the Clerk, Supreme Court of the United States, for the convenience of the Court.

to competition, had failed to show that its injury was causally related to Folger's geographical price discrimination, and had failed to establish damages to Indian Coffee (25A-36A).

Indian Coffee appealed to the Third Circuit Court of Appeals from the entry of the directed verdict against it and all related subsidiary issues, and the refusal to admit certain evidence, including expert opinions on the value of Indian Coffee's business and other exhibits related to trade allowances and Indian Coffee's price contentions.

The Court of Appeals for the Third Circuit on January 15, 1985 unanimously reversed the directed verdict and remanded the case for a new trial. A panel of the Court of Appeals comprised of Circuit Judge John J. Gibbons, Circuit Judge James Hunter, III and Judge Walter K. Stapleton (then Chief Judge for the District of Delaware and now a Circuit Judge of the Court of Appeals of the Third Circuit) ruled that the District Court committed legal error with respect to all three grounds on which it relied in directing a verdict against Indian Coffee.[2] The opinion of the Court of Appeals is reported at 752 F.2d 891. Folger's petition for rehearing and rehearing *in banc* was denied on February 15, 1985. Folger's jurisdictional statement is correct (Pet. 1).

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2. The Court of Appeals affirmed the District Court's summary judgment against Penn-Western Food Corp., a wholly-owned subsidiary of Indian Coffee on the ground that it has sold its cause of action to a third party. This matter is not before this Court.

B. Statement of the Facts.

From 1966 to early April, 1974, Indian Coffee manufactured coffee in a Pittsburgh area plant. It sold coffee to the grocery trade (grocers, grocery warehouses, group buying organizations, and grocery chains) in the greater Pittsburgh area, in areas north and east of Pittsburgh, and in a limited area of eastern Ohio along the Pennsylvania border, including Youngstown, Ohio (1-100a-102a, 195a-198a). Its principal product, Breakfast Cheer Coffee, had been sold in Western Pennsylvania for over 50 years by Indian Coffee and its predecessors (1-127a, 128a, 137a-138a). It also sold private label coffee (specific grocers' brands), institutional coffee to restaurants, clubs, etc., and small amounts of tea and instant coffee (1-104a). Its operations were essentially integrated (1-156a-158a). It had two subsidiaries, Penn-Western, also a local coffee roaster, and Fried Provision Company, which sold processed meats to grocers in the Pittsburgh area (1-132a-134a, 169a, 170a, 3-1374a).

Folger, a subsidiary of The Proctor & Gamble Company, sold coffee (3-1304a, 1305a) for many years in the states west of the Mississippi River, as well as in some southern and mid-western states ("Original Folger Area") (1-101a). It also sold instant coffee in its original areas. In late 1971, Folger began selling coffee (but not instant coffee) in the Cleveland marketing area. In March, 1973, it began selling coffee in the Pittsburgh and Philadelphia marketing areas, the latter area not being involved in this case (1-102a, 103a).

Indian Coffee, Folger and their competitors sold coffee to the grocery trade. The grocery trade treated coffee

as a product separate from other coffee products. Instant coffee had no appreciable effect on the sale of coffee to the grocery trade (1-147a-149a, 374a, 396a, 2-774a).

Coffee was frequently "featured" by a grocer—i.e., advertised and sold to consumers at a low price (sometimes below the grocer's cost as a loss leader) to encourage consumers to shop at the particular grocer's store (1-173a-175a, 357a, 358a; 2-919a, 920a, 1082a). A high percentage of all coffee sold to the grocery trade was featured (1-179a-181a, 187a). The grocery trade's decision as to which coffee to purchase, and especially to feature, was influenced principally by the price (cost to the grocer) of the coffee, provided there was significant market acceptance of the coffee (1-106a, 107a, 168a, 170a, 177a, 352a, 353a; 2-762a-767a).

The grocery trade, as well as the coffee manufacturers, used and treated "dead net price" as the price at which coffee was offered and sold (1-106a, 107a, 170a, 342a, 343a, 356a, 357a; 2-765a, 766a, 920a, 921a, 1045a, 1128a, 1129a). Dead net price is a manufacturer's list price less all available trade allowances given by a manufacturer (1-104a-107a, 168a, 169a, 456a).

Each coffee manufacturer had a list price for its coffee which in Folger's case was a nationwide list price (1-104a). List prices changed from time to time in response to cost changes, principally green coffee cost (1-106a). From time to time, and for specific periods, manufacturers offered trade allowances to the grocery trade in a specific area conforming to grocery trade warehouses and distribution patterns (1-104a, 105a). Trade allowances were (1) off-invoice allowances (OI) deducted from

the invoice price (1-105a, 363a, 364a); (2) performance allowances, typically an allowance for advertising the coffee (in the grocer's usual weekly advertisement) or displaying the coffee (stacking cases in a conspicuous place in the store) (1-105a); (3) movement allowances, typically a count and recount (CRC) paid on all coffee moved either from warehouses to stores or from stores to consumers (1-597a-599a); and (4) in-ad coupons (IAC) which the coffee manufacturer authorized the grocer to place in its usual weekly advertising and which the grocer, upon redemption by consumers, delivered to the coffee manufacturer for a specific rebate (1-104a-106a).

Off-invoice allowances were deducted on the sale invoice (1-105a). Performance, movement and in-ad coupon allowances were normally paid by the manufacturer on a bill back basis, i. e., after satisfying the allowance requirement, the grocer billed the manufacturer for the allowance amount (1-107a, 388a). Off-invoice and performance allowances were paid or calculated on coffee bought during a specific time period, movement allowances on all coffee moved during a specific time period, and in-ad coupon allowances on coffee issued by the grocer and used by consumers during a specific time period. Trade allowances were frequently combined so that more than one allowance was available during a time period (3-1545a-1559a). All trade allowances were paid directly to the grocery trade. Coffee manufacturers furnished the grocery trade with promotion announcements and other written material describing the trade allowances being offered (1-388a-391a, 455a, Plaintiff's Trial Exhibits 17-22).

Coffee was sold to the grocery trade in 24# cases, containing either 24 1# cans, 12 2# cans, or 8 3# cans

(1-104a). Most trade allowances were based on cases, except in-ad coupons which were based on cans (3-1345a).

In Cleveland, 2# cans and 3# cans were about equally popular (3-1561a-1572a). In Pittsburgh, however, the 3# can was by far the most popular—representing a high percentage of features and sales (1-181a, 355a, 383a, 384a, 461a-463a, 587a; 2-765a, 920a). From May, 1973 (after the introductory promotion) through March, 1974, 3# cans were 77.9% of Folger's shipments to the Pittsburgh market (3-1477a-1490a, 1573a-1632a). Indian Coffee's sales of 3# cans were an equally high percentage of its sales (1-463a, 511a). Trade allowances were highest for the most popular size cans (1-355a-357a; 3-1545a-1559a).

Before Folger's entry, the principal competitors in Cleveland were Maxwell House (a division of General Foods and the largest selling brand), Hills Bros., Chase & Sanborn (a division of Standard Brands), grocers' private label brands, and some minor brands (1094a). Breakfast Cheer was not a large factor in the total Cleveland market because it was sold only in limited parts of that market close to the Pennsylvania border (1-101a, 102a, 195a-198a; 2-1087a, 1088a).

In Pittsburgh, prior to Folger's entry, the principal competitors were Maxwell House (again, the largest seller), Indian Coffee (whose Breakfast Cheer was the number two selling brand), Hills Bros., Chase & Sanborn, grocers' private label brands, and other minor brands (1-188a, 189a, 317a, 437a-439a, 563a, 564a, 2-762a).

Maxwell House, Folger, Hills Bros. and Chase & Sanborn all sold coffee in many areas of the United States (3-1453a-1463a). Some private label coffee, such as Kro-

ger's, was also sold in a number of market areas (2-915a, 916a, 1096a, 1097a). Indian Coffee was the only local roaster with significant sales in either Cleveland or Pittsburgh market areas (3-1463a).

For the 52 weeks ended December 22, 1972, (before the Folger Pittsburgh entry) the greater Pittsburgh market area (3-1365a) shares of coffee sales (measured by the movement of coffee from warehouses) were Maxwell House 36.9, Breakfast Cheer 13.2, Hills Bros. 8.7, Chase & Sanborn 5.8, Folger 0.5, and all private label 26.3 (3-1518a). The Indian Coffee share in its primary Pittsburgh marketing area (1-101a) was substantially higher (1-139a). Indian Coffee's Breakfast Cheer was a strong second in both sales and featuring in the Pittsburgh area (1-353a, 354a, 359a, 445a, 564a; 2-767a; 3-1518a). It was featured more than any brand by many grocers (1-139a, 359a, 383a, 440a, 565a; 2-766a, 921a, 1094a).

Before Folger entered Cleveland and Pittsburgh, Indian Coffee had been the most aggressive competitor in offering trade allowances in its continuing attempt to build market share (1-482a; 2-766a, 921a, 1094a). Nevertheless, Indian Coffee was profitable and during that period acquired Penn-Western in 1970 and Fried Provision Company in 1969 (3-1367a-1391a). By the end of 1971, it had acquired a significant market share (about 18%) in its primary marketing area and was ready to shift emphasis from market share expansion to profitability (752 F.2d at p. 897; 1-132a, 139a, 479a, 534a, 556a).

Folger entered the Cleveland market in late 1971 with consumer promotions, heavy advertising and high, escalating trade allowances (1-199a, 203a-213a). Maxwell

House did not initially respond to Folger's Cleveland trade allowances, but after several months began to *meet* the Folger trade promotions (1-211a; 2-1070a, 1073a). Folger's Cleveland trade allowances affected Indian Coffee in those parts of the Cleveland area in which Indian Coffee sold coffee and, as a result of spillover, in the northern part of the Pittsburgh area (1-203a-213a; 2-1049a, 1050a). At least two early Folger promotions (in 1971 and early 1972) were available in Pittsburgh (1-200a-202a). In 1972, Indian Coffee at first attempted to match the Folger Cleveland trade allowances (1-213a). However, the level of Folger's trade allowances soon forced Indian Coffee to sell coffee at a loss to compete or forego competitive prices with resulting loss of business. To preserve Indian Coffee's assets, as 1972 passed, it reduced competitive pricing in the areas affected by the Folger Cleveland promotions (1-287a-289a).

In early 1973, Folger established a Pittsburgh district sales office (2-1049a) and, in March, 1973, began offering trade promotions directed to the Pittsburgh market (1-103a; 3-1545a-1559a). It engaged in extensive advertising and consumer directed promotions as well (1-366a, 386a). Its trade allowances, which began at a high level, *continued to increase* and became concentrated in the dominant 3# can size (1-263a, 264a; 3-1554a-1559a); (See also *Indian Coffee Corp. v. Folger Coffee Co.*, CCH 1982-83 Trade Cases ¶ 65, 186.) Maxwell House immediately responded by meeting the Folger trade allowances and dead net prices (1-391a, 392a; 2-771a, 772a, 1070a-1076a). Hills Bros. and Chase & Sanborn also offered increased trade allowances, but were not then a significant market factor (1-317a, 318a, 392a; 2-773a). Indian Cof-

fee, which was a very significant market factor, at first attempted to compete with equivalent trade allowances, but could not continue to do so because of all the losses sustained (1-295a, 370a, 392a, 449a, 450a; 2-772a). The Folger trade allowances required Indian Coffee to sell coffee substantially below cost to be competitive (1-291a-295a).

Folger's trade allowances on 3# cans in the Cleveland market area went from about 21% of list price in late 1971 and early 1972 to as high as 35% of list price in late 1973 and early 1974 (3-1346a, 1551a-1554a). In Pittsburgh, Folger's trade allowances on the 3# can began at 31% of list price in March, 1973, and were as high as 37.7% in November/December, 1973 (3-1349a, 1558a, 1559a). During the period from late 1971 to early 1974, trade allowances paid in the non-expansion Folger area averaged about 14% of its list price, which was a normal trade allowance level (3-1340a, 1341a).

By late 1973, Indian Coffee was financially unable to sustain the losses dictated by trade allowance levels and began seeking a buyer for its coffee business (1-297a, 298a). Its coffee sales and market share dwindled in early 1974 to virtually nothing (1-300a, 313a, 314a, 444a, 572a).

Indian Coffee went from an operating profit (before interest, taxes and life insurance) of $86,871 in 1970 to $79,464 in 1971 (3-1379a), before Folger's entry, to an operating profit of $2,200 in 1972 (3-1387a), and losses of $170,876 in 1973 (3-1395a), and $88,852 in the first three months of 1974 (3-1399a). In early April, 1974, Indian Coffee, under severe financial distress, sold the assets of its entire integrated coffee business (including Penn-Western, its private label and institutional business and

its tea business) for approximately $272,000 (1-302a-312a). It retained all of its liabilities and a significant contingent liability under a lease (1-307a, 308a). Expert witnesses (whose testimony was subsequently stricken by the District Court) valued Indian Coffee's coffee business as high as $3,200,000 at the end of 1971 and $3,500,000 at the end of 1972 (2-832a; 3-1440a, 1441a, 1444a). Mr. Deily testified that in his opinion Indian Coffee was worth $4.5 million as of the end of 1971 (34A). The purchaser of the coffee business was never, thereafter, a factor in the sale of coffee to the grocery trade (1-315a-317a; 2-733a, 925a).

In Pittsburgh, by early 1974, coffee sales and featuring had become largely concentrated in the two largest national brands—Maxwell House and Folger (1-392a; 3-1518a); convenience stores went from carrying two brands, Maxwell House and Breakfast Cheer, to one brand, Maxwell House (1-445a); similar decreases in choice affected small groceries (1-373a); there were signficant reductions in the market shares and vigor of competition of Hills, Chase & Sanborn (which eventually virtually disappeared from the market), and private label, as well as Indian Coffee's Breakfast Cheer (1-300a, 313a, 314a, 318a, 319a-323a, 394a-396a, 404a, 572a, 573a; 2-773a; 3-1518a). Kroger, a large grocery chain with its own coffee roasting facility, actually considered pulling its private label from both the Cleveland and Pittsburgh markets because of the losses it was suffering but refrained from doing so because of the expected high cost of regaining market share (2-1110a, 1111a).

From the 52 week period ending December 22, 1972, to the 52 week period ending March 15, 1974, the Pittsburgh market share of Breakfast Cheer dropped from

13.2 to 5.8, Hills Bros. dropped from 8.7 to 6.5, Chase & Sanborn dropped from 5.8 to 2.9, and Private Labels dropped from 26.3 to 15.3. On the other hand, Folger's increased from 0.5 to 12.3 and Maxwell House from 36.9 to 48.7 (3-1518a). In early 1974, Indian Coffee's shares for successive four week periods averaged about 1 (3-1364a).

The precipitous decline in sales by Pittsburgh competitors, other than Maxwell House and Folger, occurred because the level of trade allowances required selling coffee at a heavy loss. Folger's Pittsburgh 3# dead net prices were below the materials cost (green coffee and packing) for 1973 and early 1974 as was sales realization for the last three quarters of 1973 (3-1401a, 1410a). Folger's dead net prices were below the cost of manufacturing, selling and distributing coffee in Cleveland and Pittsburgh for virtually the entire relevant period (752 F.2d at p. 902; 3-1409a-1426a). Folger suffered a loss of approximately $2,388,000 from the sale of its coffee in the Pittsburgh area alone from March, 1973 through March, 1974 (3-1336a).

Under the District Court's definition of price, Indian Coffee did show substantially lower Folger prices in Cleveland from September, 1972 through March, 1974, and in Pittsburgh from March, 1973 through March, 1974, than in its other market areas (3-1561a-1634a). However, the District Court's definition of price created a much higher Folger price level (Trial Exhibit 389B, 3-1471a) than if price reflected all trade allowances (Trial Exhibit 389 Rev., 3-1465a). It drastically reduced the geographical price discrimination from the levels reflecting all allowances in price (752 F.2d at p. 902; Trial Exhibit 273, 3-1363a; Trial Exhibit 533 Rev., 3-1477a-1517a). The def-

inition also prevented Indian Coffee's establishing the large geographical price discriminations (e.g., $7.45 per case in the last quarter of 1973, in Pittsburgh) as recorded in Folger's accounting records (Trial Exhibit 13 3-1306a-1329a, 1363a).[3] The District Court's price definition eliminated any geographical price discrimination in Cleveland until September, 1972.

REASONS FOR DENYING THE PETITION

INTRODUCTION

The implicit basis of the Folger argument, to which the trial court succumbed, is that any and all price competition—no matter how it is conducted—increases competition and benefits the consumer. Hence Folger argues price competition cannot be actionable, even though it destroys a large competitor (Indian Coffee), weakens all competitors, other than Maxwell House, and creates an oligopolistic market dominated by two national companies.

Congress in enacting the Robinson-Patman Act recognized that while temporary lower prices may at first blush appear to increase competition, the *long term effect*, as here, may be to destroy local business and weaken competitive abilities and zeal and, therefore, harm the entire competitive process and competition. See *Moore v. Meade's Fine Bread Co.*, 348 U.S. 115, 117-19 (1954); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543 (1960); A.B.A.

3. Trial Exhibit 13 (3-1306a-1329a) summarized trade allowances based on Folger's accounting records (1-376a-378a, 397a-417a).

Antitrust Section, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Vol. I 74-78.

There are no novel principles to be considered by this Court to dispose of Folger's contentions. The determination of this case depends upon its facts and not upon the well settled legal principles which clearly apply. Folger's Petition is merely a furtive attempt to circumvent established principles by raising the factual questions which are properly the province of the jury.

Indian Coffee offered evidence from which a jury could find that Folger violated Section 2(a) of the Robinson-Patman Act in the sale of coffee in the Cleveland and Pittsburgh market areas and award Indian Coffee damages under Section 4 of the Clayton Act, 15 U.S.C. Section 15. Its evidence established Folger's geographical price difference between prices in Cleveland and Pittsburgh and prices in other areas of the United States; harm to competition through the destruction of Indian Coffee as a competitor, the weakening of other competitiors, a declining price structure, and predatory below cost selling; harm to Indian Coffee from its inability to meet Folger's low and predatory below cost price levels over a long period of time; and damages by documented operating losses sustained after the Folger entry and the sale of its coffee business for a value substantially less than its value before Folger's geographical price discrimination.

I. INDIAN COFFEE PROVED DAMAGES.

Indian Coffee chose a damage theory supported by a reasonable foundation—the value of its coffee business as measured by what a buyer might reasonably be expected to pay for it, absent the effect of Folger's unlawful conduct. Each of Indian Coffee's expert witnesses used that

theory. Based on their extensive experience, each reviewed the factors affecting or determining the value of a business. Each applied the reasonable probability or inference that businesses, over the long run, operate to maximize profits and in a normal market do make a fair profit. Each considered that Indian Coffee, like most small companies, had for years concentrated on increasing business value by building market share and customer acceptance, rather than increasing currently taxable profits. Indian Coffee followed the same philosophy as Folger (and Proctor & Gamble)—profits would follow acquisition of market share (752 F.2d at pp. 897-898; 2-1042a, 1043a). Indian Coffee operated, however, without subsidization from profits elsewhere and without selling at unremunerative prices.

Dr. Kaplan and Mr. Bissell evaluated Indian Coffee in the normal business environment by assuming that it could operate with trade promotion allowances comparable to the normal levels of about 14%, as Folger did in its Original Area; as Maxwell House had done in Cleveland before the Folger entry; and as Mr. Deily testified was the level in a normal market. Mr. Darby evaluated Indian Coffee in the normal business environment by using multiples and valuation of other companies in the same or related businesses, because in his experience that was a manner in which businesses were frequently valued. Indian Coffee's strong market acceptance in its local area (which all trade witnesses recognized) was an underlying basis for the opinion that it could achieve normal profits in a normal market if it so elected. Nevertheless, each expert discounted the calculated values to reflect Indian Coffee's small size, limited market, and other uncertainties. (See pp. 23-28 for a further discussion of Indian Coffee's expert opinion evidence.)

Folger's reliance on *Brunswick* is misplaced. (Pet. 9). *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). In *Brunswick,* plaintiffs sought to prove the profits that they would have realized assuming that the bowling centers Brunswick acquired and continued to operate had instead been closed. The court's holding provided that the theory was defective because plaintiffs would have sustained a loss despite Brunswick's acquisition of the centers, had the centers remained opened as a result of obtaining refinancing or being purchased by another firm. In other words, an injury resulting from normal price competition would not be actionable. But here, the injury suffered by Indian Coffee resulted from Folger's *predatory pricing* which was an anticompetitive injury because the substantive violation is anticompetitive by its nature. See *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 856, n. 16 (5th Cir. 1981); (752 F.2d at p. 903).

In addition to the expert opinions, there was in evidence Indian Coffee's financial statements showing an operating profit from 1969 to 1971. (3-1379a) Indian Coffee also offered into evidence information regarding future lost profits. (752 F.2d at p. 900, n. 4)

In summary, Indian Coffee proved some amount of damages.

II. THE FACTUAL RECORD CONTAINS EVIDENCE FROM WHICH A JURY COULD FIND HARM TO COMPETITION WHERE INDIAN COFFEE HAD SHOWN BOTH ACTUAL COMPETITIVE INJURY AND EVIDENCE OF SALES BELOW COST FROM WHICH PREDATORY INTENT COULD BE INFERRED.

The two separate bases for finding harm to competition recognized by the Supreme Court's decision in *Utah*

Pie are present here. (752 F.2d at pp. 901-903). *Utah Pie v. Continental Baking Co.*, 386 U.S. 685 (1967). First is the broad range of factors including a local competitor which is harmed, injury to competitors other than the plaintiff, a long period of price cutting, a declining price structure, and below cost selling. 386 U.S. at 697-702. Second is below cost selling from which competitive harm may be inferred. *Accord* 386 U.S. at 696 n. 12; *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97, 104 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); *National Dairy Products v. FTC*, 412 F.2d 605, 610 (7th Cir. 1969); *Lloyd A. Fry Roofing Co. v. FTC*, 68 F.T.C. 217 (1965), 371 F.2d 277, 284-85 (7th Cir. 1967); *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 486 (10th Cir.), *cert. denied*, 354 U.S. 910 (1957).

While there is certainly other evidence of competitive harm, "below cost" selling is "[p]erhaps the single most important indicia of predatory intent." 4 VAN KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION Section 29.02[2] [a] (1983). The Supreme Court's directive in *Utah Pie* "to ascertain a seller's intent from surrounding economic circumstances, which would include persistent unprofitable sales below cost and drastic price cuts themselves discriminatory" is controlling and permits the inference of harm to competition. 386 U.S. at 696 n. 12.

Folger's prices were below its raw material, manufacturing and delivery cost and below virtually any other cost measure. Competitors were required to sell below such cost to all customers in the relevant market to compete. Indian Coffee ceased to be a competitor. The market share of every competitor except Maxwell House and Folger, the two largest coffee companies nationwide, de-

clined substantially. There was a trend toward oligopoly because the two dominant coffee manufacturers nationwide also became the two dominant firms in the Pittsburgh market.

The evidence here would permit the jury to find an actual predatory intent—i.e., the intent to destroy a competitior by below cost selling. While there might not be a "smoking gun", Folger certainly knew that Indian Coffee was a purely local competitor with a large market share, wholly dependent on local sales, and susceptible to grievous harm from protracted below cost selling. Unless Folger must be exonerated from the inevitable consequences of its actions, absent a "smoking gun", the jury should have been permitted to reach the logical conclusion that Folger *actualiy intended the destruction of Indian Coffee as a competitor*—thus establishing both harm to competition and harm to Indian Coffee.

A. Potential Monopoly Power Is Not Essential To Establishing Predatory Pricing In A Robinson-Patman Case.

No geographical price discrimination case requires showing potential monopoly power to permit a finding of predation and harm to competition from below cost selling.

As the Supreme Court in *Utah Pie* implicitly recognized, while proof of ability to monopolize may be necessary in Section 2 Sherman Act, 15 U.S.C. Section 2, cases —because otherwise there is no illegal act—it is entirely unnecessary in a Robinson-Patman Section Act Section 2(a) case because geographical price discrimination supplies the illegal act. In *Utah Pie* the plaintiff, not the defendants, was virtually a monopolist. 386 U.S. at 705.

See also *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853, n. 16 (5th Cir. 1981).

The argument that a Section 2(a) geographical price discrimination case requires a plaintiff to first prove monopoly, or ability to monopolize, before using predatory pricing as evidence of harm to competition is, to say the least, curious. It permits the proof only when unnecessary or cumulative because monopoly is already established. It prevents the proof when it is necessary to establish the harm. A rather unusual approach, to say the least, where as here the below cost selling injured Indian Coffee fatally, and all other competitors markedly, despite the absence of any monopoly power.

While the ability to monopolize and thereby make unusual profits is a necessary showing in a Sherman Act case, the profit opportunity from geographical price discrimination at below cost levels is present without monopoly power. The penalty of below cost selling to a multi-market Folger is relatively small because the below cost sales are limited to a small portion of the area in which it sells. Prices and profits can be maintained elsewhere. For the local competitor, however, it is unmitigated disaster because there is no place to make up the losses. The multi-market competitor benefits greatly.

The Folger philosophy that *profits will follow market share* (2-1042a, 1043a) demonstrates the tremendous advantage of selling below cost to take business from Indian Coffee and others in the local area.

B. New Entrants Are Not Immune From Robinson-Patman Act Liability.

Folger's new entrant argument attempts to have this Court add, by judicial accretion, to the statutory defenses

in a geographical price discrimination suit. No provision of the Robinson-Patman Act specifically exempts new entrants from its application. Both conceptually, and from a reading of the cases cited in the Petition, a new entrant is free from Robinson-Patman liability, not because exempted, but because factually no harm to competition has been shown. Therefore, even if Folger was a new entrant, it should not prevent Indian Coffee's making out a case under Section 2(a).

While theoretically, the appearance of a new entrant increases competition, rather than harming it, its method of entry might, as here, harm competition. Under the Folger theory, large, wealthy corporations, thriving on extensive profitable operations in other areas, could enter new local markets with geographically lower prices at a fraction of the cost of producing the product. Folger could continue such below cost sales until all local competitors were forced out of business, because local competitors would be unable to finance sales at a loss to maintain market position. The local competitors are equally dead, whether killed by a new entrant or an old competitor.

Folger relies most heavily on two cases in support of its new entrant argument: *Dean Milk Co. v. FTC,* 395 F.2d 696 (7th Cir. 1968) and *National Dairy Products v. FTC,* 412 F.2d 605 (7th Cir. 1969). Neither establishes a new entrant exception or holds that evidence of long continued sales below cost cannot permit an inference of harm to competition by new entrants.

In *Dean,* the court particularly noted that persistent sales below cost and radical and discriminatory price cuts are significant factors in proving harm to competition. "[P]roof of their existence . . . could give rise to an in-

ference of predatory intent and apparently would preclude characterizing a company's activities as motivated by only fierce competitive instincts." 395 F.2d 707-08 (footnote omitted). Below cost sales were sporadic and negligible. *Id.* at 708. Contrary to Folger's assertion, *Dean* does not create a new entrant exception to liability under Section 2(a).

Folger clearly misconstrues the Seventh Circuit's reference to new entrants in *National Dairy Products*. The court said: "[i]n arriving at the finding of predatory intent, *the sum total of all the evidence must be considered.*" 412 F.2d at 618 (emphasis supplied). The court did not condone persistent sales below cost by new entrants, but only geographically lower prices used to combat an entrenched monopolist. The trier of fact has to evaluate the evidence, in any event, to determine which objectives are present.

C. Indian Coffee Offered Evidence From Which A Jury Could Find Harm To Competition From Folger's Geographical Price Discrimination.

Section 2(a) does not even require showing actual harm to competition—by its very language it requires only showing that the effect of geographical price discrimination "may be substantially to lessen competition." The "Act reaches price discrimination that erodes competition as much as it does price discrimination that is intended to have immediate destructive impact." *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 703 (1967). A Section 2(a) geographical price discrimination case, it held that legally required harm to competition may be

found, *inter alia,* from all attendant circumstances, including a local competitor competing against multi-market competitors, injury to competitors other than the plaintiff, a long period of price cutting, a declining price structure, and below cost selling. *Id.* at 697-702. Accord *Continental Baking Co. v. Old Homestead Bread Co.,* 476 F.2d 97, 105 (10th Cir. 1973); *Atlas Building Products Co. v. Diamond Block & Gravel Co.,* 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960). Here, there was harm and destructive impact, as well as erosion of competition (752 F.2d at pp. 902-903).

Curiously, the evidence from which the District Court concluded that competition was increased not harmed included the factors appearing in *Utah Pie* plus more: (1) a local company competing with a number of multi-market companies (2-1135a; 3-1463a, 1518a); (2) the actual destruction of the local competitor (1-288a-316a; 3-1367a-1399a, 1400a); (3) marked reduction of the Pittsburgh market shares of every competitor except Maxwell House and Folger, the two largest coffee companies nationwide (3-1518a); (4) reduction in consumer choice in convenience stores from two brands of coffee (Maxwell House and Breakfast Cheer) to one brand (Maxwell House) (1-445a); (5) consideration by Kroger, a large grocer, of withdrawing its private label brand from the markets because of continuing losses, but electing not to do so because of the anticipated heavy expense of any attempt to reacquire lost market position (2-1110a-1111a); (6) virtual elimination of Chase & Sanborn from the Pittsburgh market (1-318a-319a, 394a-395a; 2-773a, 925a); (7) concentration of coffee featuring Maxwell House and Folger (1-318a-320a, 396a; 2-926a); (8) long continued price cutting (3-1545a-1559a); (9) long continued below

cost selling (3-1401a-1426a); (10) a declining price structure in the eye of the coffee trade (3-1465a-1476a); and, (11) ultimate domination of the market by the two largest multi-market companies, Folger and Maxwell House, which had displayed a willingness to sell their coffee at tremendous losses to hold or increase market share (1-368a, 370a, 391a-392a; 2-922a-924a; 3-1518a). If that is increased competition, then God help all competitors unable or unwilling to absorb large losses for a long time period and the consumers who will ultimately be the victim of Folger's philosophy that when market share is acquired, profits will follow (2-1043a).

Utah Pie had one significant difference. *Utah Pie,* which had a 66.5% market share before and a 45.3% market share afterward, survived and prospered. 386 U.S. at 705.

The District Court succumbed to the superficial argument that Folger's actions in the Cleveland and Pittsburgh areas were a boon to competition and consumers because it added a new vigorous competitor and lowered prices to consumers. With that short-sighted a vision, it would be virtually impossible to postulate a geographical price discrimination which harmed competition. Aggressive competition at a low price is essential to a Section 2(a) case. While lower prices and a new entrant are appealing at first blush, all that glitters is not gold. Heavy price promotion may, in the short term, appear pro-competitive, but in the *long term,* as here, it will weaken and harm competition. Competitors were weakened, discouraged, or destroyed (3-1518a); a strong local competitor was eliminated to be replaced by a multi-

market giant (1-288a-316a; 3-1367a-1399a, 1400a); and two multi-market companies then dominated the market (1-319a-320a; 2-926a; 3-1518a). Such market domination, with the demonstrated willingness to suffer large losses to get and maintain market share, hardly encourages a truly competitive market in which all manufacturers have a real chance of competing.

This case represents the classic erosion of competition condemned by *Utah Pie,* 386 U.S. at 703, as well as direct immediate harm to competitors and competition. Thus, a jury could have reasonably concluded, from all the evidence, that there was harm to competition from Folger's geographical price discrimination.

III. THE COURT OF APPEALS' RULING ON THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE UNDER RULE 703 OF THE FEDERAL RULES OF EVIDENCE WAS CORRECT AND DOES NOT WARRANT REVIEW BY THIS COURT.

The Court of Appeals unanimously ruled that the trial court committed legal error in striking Indian Coffee's expert evidence on valuation (752 F.2d at p. 894). Each of the acknowledged expert witnesses described the information relied upon, the source of such information and, additionally, testified that it was the type of information relied upon by experts in the field of valuing a business (1-620a-649a; 2-650a-655a, 818a-820a, 928a-941a). Nevertheless, the trial court excluded Dean Kaplan's and Mr. Bissell's testimony on the ground that neither could rely on Mr. Deily's testimony concerning a normalized market trade allowance level of 14% because it was unreliable (1-94a; 33A-34A).

There was other compelling evidence indicating that 14% was in fact a normal level for trade allowances—principally Folger's own records showed that trade allowances in its entire Original Folger Area averaged about 14%.[4] In addition, cost information of Maxwell House in Cleveland from April to December, 1971, prepared by an FTC staff accountant, showed a 14% advertising and trade promotion cost (2-673a; 3-1428a). Therefore, not only was Mr. Deily's testimony corroborated in fact as reliable, based on his extensive knowledge of the coffee business and the facts from Folger records and the Maxwell House information, the corroborative evidence itself was ignored as proof of the 14% level.

Mr. Darby did not rely on the 14% trade allowance level, but rather looked at profit levels of comparable companies, the value of a coffee business sold in 1971, and the Folger cost of acquiring a 12% market share in Pittsburgh in valuing the business (2-938a-941a). His opinion was also stricken because of a reliance on Mr. Deily's opinion that Breakfast Cheer could reduce trade allowances and still maintain its market position (2-1293a). Again, the decision focused on Mr. Deily's statement and ignored other relevant evidence.

Mr. Darby expressly relied on a number of interrelated factors: that Indian Coffee had a material market share (which could vary somewhat without affecting his opinion); that its previous corporate goal had been to

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4. Reduced Revenue plus In-Ad Coupons divided by Sales Realization from Trial Exhibit 14 (3-1340a, 1341a, 1405a, 1407a). Dean Kaplan's 15.8% included advertising as well (2-673a, 3-1428a).

minimize profits and maximize growth; that its Breakfast Cheer Coffee was a widely accepted brand; and that a company could make a fair profit in a normalized market (2-987a-989a, 1005a-1006a). He also took potential new entrants into consideration (2-1005a-1007a). Each of these factors directly relate to how the market would look to a potentially interested buyer. Mr. Deily's statement about maintaining market share was but another factor on that point.

Mr. Deily testified that Indian Coffee's attempt to raise its market share by trade promotional activity was responsible for the higher than normal trade allowances in Pittsburgh (1-329a, 330a, 556a). Mr. Deily acknowledged that reduction in trade allowances would have to be done in stages, but certainly did not prove that the normalized level (or a level approaching the normalized level) could not be reached without loss of market share (1-534a-537a, 556a, 558a, 559a). The large Original Folger Area reflected a normal trade allowance level; the Maxwell House figures for Cleveland, the market next door, reflected a normal trade allowance level; and normal businessmen act to maximize profits. There was no basic reason whatsoever to infer that Indian Coffee, with its wide acceptance by both grocers and consumers in the Pittsburgh area, would fare worse than others in a market dedicated to maximizing profit.

The issue is thus analogous to that in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir. 1981), where the plaintiff sought damages based upon a "normal price", proved by evidence supplied by a principal of the plaintiff and information taken from records of the defendants. The court there determined that it was for the jury to

decide the true level of normal prices as an issue of credibility or reliability. *Id.* at 858, 859, n. 24. The court also pointed out, *Id.* at 857, n. 22, that absent evidence to the contrary, it will be assumed that businessmen are profit maximizers and so act (quoting from *Knutsen v. Daily Review, Inc.*, 548 F.2d 795, 812 (9th Cir. 1976). In short, that case confirmed just what Indian Coffee's expert witnesses assumed for the purpose of their valuation —that businessmen would act in a reasonable and sensible manner to maximize profits and would not long engage in profit-limiting actions. While the holdings in *Malcolm* were on a motion for directed verdict, we submit it was manifestly erroneous for the District Court, not the jury, to decide an issue of fact, and inferences from facts, merely because they relate to expert testimony.

A reading of the entire testimony of Kaplan (1-610a, 2-757a), Bissell (2-781a-786a), and Darby (2-928a-1032a) demonstrates that as experts were testifying essentially about the future—what would happen but for Folger's intrusion in the market with *sales below cost*—and there must be some uncertainties. Undoubtedly, one uncertainty was what would have actually happened in the market. Current market acceptance and the predisposition of businessmen to maximize profits are the prime factors in predicting what will happen. The experts factored them into the valuations, with substantial discounts applied against Indian Coffee's value to allow for any perceived uncertainty.

As in most things, absolute certainty is not available and, when claimed, is suspect. But such intrinsic difficulty cannot be an excuse to immunize otherwise illegal conduct. It is beyond cavil that the antitrust plaintiff's

burden of proving the amount of damages is lighter than its burden of proving cognizable injury attributable to the violation. As the Supreme Court stated in *Story Parchment Co.*, 282 U.S. at 562-63:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief in the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result may be only approximate."

When proof of the fact of damage is established, proof of the amount may actually border on the speculative to facilitate the policy of the antitrust laws. *Malcolm,* 642 F.2d at 858; *Hobart Brothers Co. v. Malcolm T. Gilliland, Inc.,* 471 F.2d 894, 903 (5th Cir. 1973); *Ford Motor Co. v. Webster's Auto Sales, Inc.,* 361 F.2d 874, 887 (1st Cir. 1966). Indeed, estimates as to the amount of damages may rest on assumptions so long as these assumptions rest on an adequate base. *Malcolm,* 642 F.2d at 858; *Terrell v. Household Goods Carriers' Bureau,* 494 F.2d 16, 24 (5th Cir. 1974); *Hobart Brothers Co.,* 471 F.2d at 902. Here the adequate bases included the statistical information supporting the 14% trade promotion level, as well as Mr. Deily's testimony; the profit maximizing assumption; and the strong Breakfast Cheer franchise recognized by all the trade witnesses (1-353a, 445a, 564a, 766a, 921a).

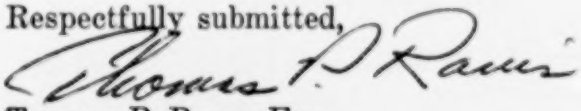
In view of the foregoing, it was a manifest abuse of discretion for the trial court to strike the expert testimony and the ruling of the Court of Appeals should be affirmed.

CONCLUSION

Respondent Indian Coffee respectfully submits that no question is presented by the decision of the United States Court of Appeals for the Third Circuit which is worthy of review by this Court. Therefore, the Petition for Writ of Certiorari should be denied.

Dated: June 12, 1985.

Respectfully submitted,



THOMAS P. RAVIS, ESQ.
Counsel of Record
992 Perry Highway
Pittsburgh, Pennsylvania 15237
(412) 367-7271
Attorney for Respondent
INDIAN COFFEE CORP.

Of Counsel:
FRANK R. FLEMING, III, ESQ.
HOUSTON HARBAUGH
Two Chatham Center
Twelfth Floor
Pittsburgh, Pennsylvania 15219
(412) 281-5060